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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 177

HARRY I. SCHWIMMER,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on April 23, 1956.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported, and is printed in the Appendix, infra, p. 9.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 23, 1956. A Petition for Rehearing was filed by petitioner on May 11, 1956, and said petition was denied

on May 21, 1956. An order staying the Court of Appeals' mandate was entered on June 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether the compulsory production of the personal records of a person under investigation by a Grand Jury, which records were subpoenaed from a third party with whom the records had been kept in storage, constitutes an unreasonable search and seizure.

2. Whether a person, who is the subject of an investigation by a Grand Jury and who claims that the seizure of his personal records **for use in such investigation** from a third party with whom they had been stored constitutes an unreasonable search and seizure, thereby waives the claim of the privilege against self-incrimination.

3. Whether the Court of Appeals, in ruling that a waiver of the attorney-client privilege may be shown through twice-removed hearsay assertions by Government counsel, erred in failing to consider the required unequivocal waiver necessary to breach the confidential nature of the attorney-client privilege.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT.

Petitioner is an attorney at law (R. 9) who had for many years practiced law in Kansas City, Missouri. Several years ago petitioner for health reasons gave up his practice of law in Kansas City and stored his legal files and personal records with the Dean Rubber Manufacturing Company there (R. 9). On October 18 and October 21, 1955, during the course of a Grand Jury investigation in St. Louis, Missouri, the Government served certain subpoenae duces tecum on said Dean Rubber Manufacturing Company. The first of these subpoenae required said company to produce before the Grand Jury all of the books, records and other documents of petitioner which the company had in its possession (R. 1). The second subpoena required the production before the Grand Jury of all books and records of the petitioner relating to his representation of Irving Sachs, Shu-Stiles, Inc., Mrs. Laura Taylor and related persons from September 1, 1945, to date and the petitioner's records of his personal receipts and disbursements (R. 2).

On the return date of said subpoenae the petitioner filed in the District Court motions to quash said subpoenae duces

tecum, alleging that they constituted an unreasonable search and seizure, that the files produced by the Dean Company constituted his legal files in the representation of his clients, and that the subpoenae called for the production of confidential communications between attorney and client and violated the right of privacy essential to an attorney in the handling of a clients affairs, all in violation of the Fourth Amendment to the Constitution of the United States (R. 4-8).

During an argument held before the District Court in St. Louis on the petitioner's motions, Government counsel argued that petitioner's legal files should be made available to the Grand Jury since the jury was then investigating the petitioner himself with regard to the Irving Sachs tax case, and that the jury desired to investigate all of the cases in which Mr. Schwimmer had been involved in an attempt to determine whether he had used improper influence in the handling of his cases (R. 20). With regard to the purported waiver of the attorney-client privilege by petitioner's clients Laura Taylor and Shu-Stiles, Inc., Government counsel stated to the Court only that Laura Taylor had told the Grand Jury that petitioner had not been her attorney, and that a St. Louis attorney had told Government counsel that Shu-Stiles, Inc., had waived the attorney-client privilege (R. 22-23, 29).

The District Court thereupon denied petitioner's motions to quash (R. 32, 34-35), held that petitioner's clients Sachs, Shu-Stiles, Inc., and Taylor had waived the attorney-client privilege and appointed an attorney as the Court's representative to examine the documents and to deliver directly to the Grand Jury all unprivileged documents in petitioner's files and all documents relating to Sachs, Shu-Stiles and Taylor.

Petitioner filed a notice of appeal from said orders to the United States Court of Appeals for the Eighth Circuit (R

36). Said Court of Appeals on April 23, 1956, reversed the District Court's order as to the broader subpoena, and held further that the so-called narrow subpoena (that which dealt only with personal records of petitioner and his files relating Sachs, Shu-Stiles and Laura Taylor) was not an unreasonable search and seizure, did not violate the Fourth Amendment, and that appellant had failed specifically to claim the privilege against self-incrimination under the Fifth Amendment. The Court also held that the appointment of a Court's representative to inspect the files and to deliver certain of said files to the Grand Jury without notifying petitioner of his determination thereon was erroneous, and that the proceedings should be returned to the District Court so that a more proper procedure might be followed.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals ruled (Opinion, page 3) that petitioner in his motions attacking the subpoenae made no claim of his privilege against self-incrimination under the Fifth Amendment to the United States Constitution. The Court therefore considered the validity of the subpoenae only with regard to whether they constituted an unreasonable search and seizure and a violation of the attorney-client privilege under the Fourth Amendment.

It is, however, clear from Government counsel's statement during the hearing on the motions in the District Court that petitioner was then himself the subject of the Grand Jury inquiry and that his own conduct and activities with regard to legal cases which he had handled were then under investigation (R. 20). The privilege against self-incrimination protects one under investigation from any disclosure whether the same is in the form of oral testimony or through the compulsory production of his private books and papers. **United States v. White**, 322 U. S. 694. This Court has held that the constitutional

guaranty against self-incrimination extends with equal force to the compulsory production of one's own documents, files and private papers. **Boyd v. United States**, 116 U. S. 616; **Wilson v. United States**, 221 U. S. 361.

Under these circumstances and where Government counsel clearly admitted that petitioner was under investigation by the Grand Jury at the time of the compulsory production of petitioner's records, petitioner contends that the Court of Appeals has unduly narrowed the scope and applicability of the privilege against self-incrimination and the privilege from unreasonable searches and seizures. This Court has specifically held that the compulsory production of one's private papers and documents for the purpose of establishing a criminal charge against him comes within the direct scope of the Fourth Amendment to the United States Constitution since the use of such evidence is a material ingredient and effects the sole object of the search. **Boyd v. United States**, supra. It was held in that case that there was no essential difference in the seizure of one's private books and papers to be used against him in evidence and compelling him orally to testify against himself. Since, in the instant case, there is no question but that petitioner specifically claimed that the subpoenae in question constituted an unreasonable search and seizure and were violative of the Fourth Amendment to the Constitution of the United States, and since this Court has held that the compulsory production of one's private books and papers compels him to be a witness against himself and comes within the scope of the Fourth Amendment, petitioner believes that he has properly raised the issue of self-incrimination and that it is unduly harsh and restrictive to condone the compulsory production of petitioner's own records on the mere basis that petitioner's motion to quash the subpoena did not formally contain the words "Fifth Amendment." The Fourth and Fifth Amendments to our Constitution have been held to

be "in the nature of twins" and to have an intimate relationship. **Boyd v. United States,** supra; **United States v. Scully,** 2 Cir., 225 F. (2d) 113, 117. See also **Counselman v. Hitchcock,** 142 U. S. 547, 581, which reaffirmed the principle announced in the Boyd case that the compulsory production of one's private papers is the equivalent of an **unreasonable search and seizure** within the meaning of the Fourth Amendment; and **Hale v. Henkel,** 201 U. S. 43, 71.

Petitioner believes therefore that the Court of Appeals erred, in reviewing the question of the validity of the respective subpoenae, in failing to take into consideration the fact that they compelled defendant to give evidence against himself in a criminal proceeding contrary to any semblance of the protection of petitioner's constitutional guaranties. This matter, involving the arbitrary seizure of large portions of an attorney's private files and records in a Grand Jury proceeding is one, we believe, of broad and general interest, and one requiring review by this Court by final determination thereon.

2. In ruling that a waiver of the all important attorney-client privilege may be determined from twice-removed hearsay, the Court of Appeals has failed to consider the significance of this privilege and the degree of proof required to establish a waiver. The Court of Appeals has held that a waiver as to Taylor and Shu-Stiles of the attorney-client privilege was proved in the District Court from the mere fact that Government's counsel stated that Laura Taylor had told the Grand Jury that petitioner had never been her attorney and that a St. Louis attorney had purportedly told Government counsel that Shu-Stiles, Inc., had waived its attorney-client privilege. In ruling that such equivocal and ineffectual hearsay statements may be considered sufficient to warrant a Court in vitiating the attorney-client privilege, the Court of Appeals has ruled contrary to decisions which have held that there must be an unequivocal waiver and clear proof that the client has

elected to waive the confidential communications given to his attorney. **Robinson v. United States,** 6 Cir., 144 F. (2d) 392; **Modern Woodmen of America v. Watkins,** 5 Cir., 132 F. (2d) 352. Indeed, the Court of Appeals for the Eighth Circuit has itself in the earlier case of **Liggett v. Glenn,** 8 Cir., 51 F. 381, ruled that a communication confidentially made between attorney and client can never be introduced or admitted in evidence unless the client by some unequivocal action on his part renders the communication unprivileged and competent in evidence.

This rule has been established so that there may be clear and utter confidence established between an attorney and his client and so that a client will not be hesitant to disclose to his attorney all matters necessary for his proper representation. See **Hickman v. Taylor,** 329 U. S. 495. The entire structure of the attorney-client relationship will be demoralized and greatly hindered if the privileged character of the same may be abolished on such purported proof of waiver as was offered in the District Court. Nothing less than the testimony of the client in open Court, or the Grand Jury testimony, if any there was, or some other clear act or course of conduct by the client, should ever be sufficient to constitute a waiver of a guaranty so steeped in the principles of advocacy and the proper and honorable representation of an attorney's clients. Petitioner believes this question to be of such great importance and general interest in the orderly administration of the law as to warrant review by this Court on the issues herein involved.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

HARVEY B. COX,
MORRIS A. SHENKER,
Counsel for Petitioner.

OPINION OF COURT OF APPEALS.

UNITED STATES COURT OF APPEALS.
For the Eighth Circuit.

No. 15,460.

Harry I. Schwimmer, Appellant, vs. United States of America, Appellee.	Appeal from the United States District Court for the East District of Missouri.

[April 23, 1956.]

Harry I. Schwimmer, pro se (Morris A. Shenker was on the brief), for Appellant.

Murry L. Randall, Assistant United States Attorney (Harry Richards, United States Attorney, with him on the brief), for Appellee.

Before Gardner, Chief Judge, Johnsen and Vogel, Circuit Judges.

Johnsen, Circuit Judge.

This is an appeal from a denial by the District Court of motions to quash two subpoenas duces tecum issued in a grand jury investigation.

The grand jury, one in session at St. Louis, Missouri, had engaged in investigating tax evasions and official corruption in connection therewith. In the course of its proceedings, it desired to have produced before it the files, papers and records of an attorney, Harry I. Schwimmer, as a means of obtaining information regarding the tax affairs of Schwimmer's clients and his handling of their situations. Among the matters which it was endeavoring to probe was what, if anything, Schwimmer had done or caused to be done in official circles to effect the disposition of a previous tax difficulty of Irving Sachs, president of Shu-Stiles, Inc.

Schwimmer, a lawyer at Kansas City, Missouri, for many years, had closed his office a short time before, placed his files in storage with the Dean Rubber Manufacturing Co., of North Kansas City, and gone to the Island of Puerto Rico. The things which he thus had stored were contained in four cardboard boxes and four filing-cabinet drawers.

A subpoena of unlimited scope first was issued to the Dean Rubber Manufacturing Co., requiring it to appear and produce before the grand jury "All books, records, files, log books, diaries, memoranda, correspondence, and other documents of Harry I. Schwimmer now on your premises or in your possession, custody or control."

Three days later, and before the time prescribed for such appearance and production, a second subpoena, of restricted reach, was issued to the Dean Rubber Manufacturing Co., requiring it to appear and produce before the grand jury, on the same date as that fixed by the first subpoena, "All books, records, files, log books, diaries, memoranda, correspondence, and other documents of Harry I. Schwimmer now on your premises or in your possession, custody or control relating to the affairs of or any matter, proceeding, investigation, or other representation of Irving

Sachs, Shu-Stiles, Inc., Mrs. Laura Taylor and related persons, corporations, and affairs in connection with which the said Harry I. Schwimmer acted and/or participated in any manner whatsoever during the period from on or about September 1, 1945, to date [a period of approximately 10 years],[1] together with all records during the same period recording or reflecting the receipts and disbursements of said Harry I. Schwimmer personally and of any firm or partnership of which he was a member." Sachs and Mrs. Taylor, referred to in the subpoena, were both officers of Shu-Stiles, Inc.

When Schwimmer learned of the issuance of the subpoenas he came back from Puerto Rico and filed a motion to quash each of them as constituting, on various grounds, an unreasonable search and seizure in violation of the Fourth Amendment. No claim of privilege against self-incrimination under the Fifth Amendment was, however, asserted by him.

The motions to quash were presented to and heard by the Court on the day that the Dean Rubber Manufacturing Co. was required to respond to the two subpoenas. That Company had brought in and deposited before the grand jury, at the appointed time, all the containers which Schwimmer had placed in storage with it, but the boxes and cabinet drawers were kept under seal by the Marshal until the Court had had an opportunity to consider Schwimmer's motions.

Among the objections made by Schwimmer to the subpoenas was that the forced production sought of his files was unreasonable, because a violation of the attorney-client privilege would be involved in the grand jury's examination of them.[2] From the showing made by the Government

[1] The bracket insertion is ours.

[2] The several objections urged to each subpoena will be considered later.

on the hearing, the Court held that a waiver had been made by Shu-Stiles, Inc., by Sachs, and by Mrs. Taylor as to any attorney-client privilege that might have existed in their favor, and that there was therefore no basis for Schwimmer to claim any sanctity as to his files in protection of a privilege in any of these three parties.

The Court, as has been indicated, ruled that both of the subpoenas were reasonable as against all of the objections raised by Schwimmer's motions, and that Schwimmer was not entitled to have either of them quashed. It incorporated a qualification, however, in its subsequently filed order, making appointment of a Master to take possession of the delivered boxes and cabinet; to make an examination of everything contained in them; to remove such documents as the Master should deem to be within the attorney-client privilege of any clients of Schwimmer other than Shu-Stiles, Inc., Sachs and Mrs. Taylor; to impound whatever documents he so found to be privileged and deliver them to the Court for holding until further order; and to turn over to the grand jury everything else in Schwimmer's files for examination and use by it in its proceedings.

It will be noted that the Court gave the Master the power of full and final judgment on what documents were subject to the attorney-client privilege, and that no opportunity or right was accorded Schwimmer to check or have reviewed by the Court such result as the Master might reach.

On the filing of a notice of appeal and the making of an application to us for a stay of the Court's order pending appeal, we stayed the operation of the order made as to the first subpoena and denied the request for a stay as to the second. This, in relation to the qualification contained in the Court's order, as set out above, left the situation where the Master was able to turn over to the grand jury Schwimmer's records of receipts and disbursements and everything in his files which the Master found to be con-

nected with the affairs of Shu-Stiles, Inc., Sachs and Mrs. Taylor, either directly or as a matter of relationship on the part of any person or corporation to those affairs, except as the Master concluded that there had existed a personal attorney-client relationship between any such related person or corporation and Schwimmer, distinct from that involved as to Shu-Stiles, Inc., Sachs and Mrs. Taylor, and that some particular paper or papers came within the privilege of that separate relationship.

The matter is now before us for a review on the merits of the order made by the trial court, denying the motion to quash as to each of the two subpoenas.

The compelled production of one's private books and papers through a subpoena duces tecum, for use against him in a criminal proceeding, is, of course, as much within the guaranty of the Fourth Amendment against unreasonable searches and seizures as is a reaching of them by means of a warrant. **Boyd v. United States**, 116 U. S. 616, 622, 6 S. Ct. 524, 29 L. Ed. 746.

The term "criminal proceeding", within this rule, includes the investigation of a grand jury, since such a body is merely an adjunct or "appendage" of the court, and the things it does represent an incident or process in the part played by the judicial system in criminal law enforcement. 284 Am. Jur., Grand Juries, § 2.

Refusal of the District Court to quash, as an unreasonable search and seizure, a subpoena duces tecum issued in a grand jury investigation is a final or appealable order. **Perlman v. United States**, 247 U. S. 7, 12, 13, 38 S. Ct. 417, 63 L. Ed. 950.

Such a motion to quash is entitled to be made by the owner of books and papers, in relation to a grand jury investigation of him, as to a subpoena duces tecum issued

against a third party, in ·hose possession the books and papers are, but who is merely a custodian, without personal right in the books and papers as such, and with constructive possession and ontrol of them thus remaining in the owner. The law recognizes no distinction between constructive possession, wth control, and physical possession, as a basis for a subpoena to compel production, so that such process directe to and served upon an owner, who is in constructive posession and control, is as legally capable of commanding the production of his books and papers as is one against a third party, who is in physical possession of them for him. The question of whether to issue a subpoena againstthe owner or against the third party thus ordinarily is in such a situation merely one of procedural choice and convenience. Substantively, each involves, except as to th task of appearing and making delivery, the same aspects of reach, deprivation and seizure-effect against the owner.

We are accordingly unble to see any merit in the argument made by the Govenment here that, since the books and papers physically were in the possession of the Dean Rubber Manufacturing Co. and the subpoenas involved were issued against it, Schwimmer had no basis for claiming unreasonable searchand seizure against him and so could not make a motio to quash on that ground. We think that Schwimmer legally had such possession, control and unrelinquished personal rights in the books and papers as not to enable the question of unreasonable search and seizures to be escaped through the mere procedural device of compelling a third-party naked possessor to produce and deliver them.

The constitutional afeguard against unreasonable searches and seizures is nore than a reach at mechanics in process. It is concerned with instrinsic as well as extrinsic aspects, and its look is at reality, not theory, in respect to

the whole of what is being done. In general terms, the test to be applied under it is whether the thing done or attempted to be done, in the sum of its form, scope, nature, incidents and effect, impresses as being fundamentally unfair or unreasonable in the specific situation, when the immediate end sought is considered against the private right affected. But since, as emphasized, the question of reasonableness or unreasonableness in search is one of realistic and not theoretical approach, the test stated is of course merely a principle and not a rule, and so is of subjective value only, and not of objective force, in the making of specific appraisal.

In extrinsic aspect, a subpoena duces tecum may be so broad in its scope as to go substantially beyond the bounds of apparent relevance in relation to an immediate pursuit and so be unreasonable. Or it may be so onerous in its burden as to be out of proportion to the end sought. **Hale v. Henkle**, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652; **McMann v. Securities and Exchange Commission**, 2 Cir., 87 F. 2d 377, 109 A. L. R. 1445. In intrinsic aspect, it may involve an improper intrusion into what is, in relation to the purpose of the investigation, purely private or privileged papers. These are, of course, only generalized examples.

Ordinarily, as a matter of both extrinsic and intrinsic aspect, the compelled production before a grand jury of all of one's books and papers en masse, where they constitute a substantial body, a variety of accumulation, or an extensive-period product, and the subpoena is without indication or limitation of any nature as to class of persons, or type of transaction, or extent of period, to which the production is intended to be related, will judicially impress as not constituting a reasonable search and seizure.[3] Cf. **Federal Trade Commission v. American Tobacco Co.**,

[3] The unreasonableness of such a subpoena, however, turns not on any legal absolutism but on evaluative impression.

264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696; **Consolidated Rendering Co. v. Vermont**, 207 U. S. 541, 28 S. Ct. 178, 52 L. Ed. 327. That impression tends naturally to be created in such a situation, as a matter of fundamental fairness, unless it is apparent that such an en masse production is not an attempt to obtain a sea for the conducting of a general fishing expedition or—in the language of Judge Learned Hand—to make possible "an exploratory investigation whose purposes and limits can be determined only as it proceeds." **McMann v. Securities and Exchange Commission**, supra, 87 F. 2d at page 379.

In the present situation, the first subpoena covered "All books, records, files, log books, diaries, memoranda, correspondence, and other documents" of Schwimmer. It thus was as broad as it could possibly be made. What it sought to have produced en masse manifestly constituted in the situation a substantial body, a variety of accumulation, and an extensive-period product. The contents of four cardboard boxes and four cabinet drawers were involved. The books and papers related to various other clients and legal affairs than Schwimmer's representation of Shu-Stiles, Inc., and Sachs. And from the dates set out in the second subpoena by way of limitation, the files recognizedly covered at least a ten-year period of general legal practice.

The en masse production sought, as stated by Government counsel on the hearing of the motion to quash, was for the purpose of "attempting to ascertain whether that (Sachs' tax) case was improperly handled in Washington by reason of political influence, favoritism, or other forms of corruption", and seeking to discover "what other cases [if any] Mr. Schwimmer was involved in and in what transactions he used the same connections and how and when." This attempt at justification did not even so much as claim that there existed indication that Schwimmer had handled other tax cases or transactions, as a basis or op-

portunity for some other crime, than in the Sachs' matter, to have been even possible.

On all these aspects, it seems to us that the excursion desired to be made by the grand jury, through such a varied accumulation, over such an extensive period, as an abstract hunt for possible crime in Schwimmer's legal practice, would dominatingly constitute a general fishing expedition, and that the compelled production of all the files and papers thus would amount in the situation to an unreasonable search and seizure against Schwimmer. We accordingly think that the trial court's denial of the motion to quash the first subpoena was erroneous and must be reversed. This general conclusion makes unnecessary any consideration of the question of violation of attorney-client privilege or other objection raised by Schwimmer as to the production required by this subpoena.

But since the Dean Rubber Manufacturing Co. made production and delivery of all the files and papers en masse, as a compliance also with the second subpoena, without any attempted separation by it of such documents as had application only to the affairs of Sachs, Shu-Stiles, Inc., and Mrs. Taylor, either directly or as a matter of relationship on the part of any person or corporation to those affairs, and since the motion to quash was not made and presented to the Court until the occurrence of this production and delivery on the part of the Dean Rubber Manufacturing Co., our reversal as to the first subpoena is entitled to have effect in Schwimmer's favor only as a prevention of any examination being made by the grand jury of such files and records as are beyond the scope of the second subpoena, which safeguard was interlocutorily afforded Schwimmer by our previous stay pending appeal.

Schwimmer attempts to argue, in attack upon the second subpoena, that it also, like the first, is too broad to be reasonable, in that it contains no sufficient designation as to

kind or character of the matters required to be produced and "is in effect a general warrant for the making of a search of the legal files and records of this movant without any regard to the relevance or materiality and no matter what the nature thereof may be." We think this contention is without merit.

Relevance and materiality necessarily are terms of broader content in their use as to a grand jury investigation than in their use as to the evidence of a trial. They must be given practical meaning in relation to the functions which a grand jury is designed to serve and to realities which are necessary in any expeditious carrying-on of its operations. Thus, a grand jury has no catalog of what books and papers exist and are involved in a situation with which it is attempting to deal, nor will it ordinarily have any basis for knowing what their character or contents immediately are. It can therefore hardly be expected to be able to designate or call for what its exact needs may ultimately turn out to be. And since the path which it is entitled to travel in its search for probable cause has no general limits except those of reasonableness on the entirety of the situation being pursued, it obviously has a right, as against the objection of unreasonable search and seizure, to a fair margin of reach and material in seeking information, not merely direct but also as a matter of possible light on seemingly related aspects whose significance it is seeking to uncover. Some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury.

In the present situation, we do not believe that the scope of the second subpoena can be said to have involved an unreasonable margin of reach as to either material, parties or time, in respect to the investigation of Schwimmer's handling of the affairs of Sachs, Shu-Stiles, Inc., and Mrs. Taylor. The required production of an attorney's files of a specific client's affairs, for a reasonably limited period of

time, in a grand jury's investigation of incidents involved in the attorney's handling of some of those affairs, does not impress, abstractly and without any demonstration, as constituting one of such unwarranted scope or of such substantial, apparent irrelevancy as to be generally unreasonable. Nor can the call for papers here, extending back to September 1, 1945, be said to represent an unreasonable period of time in the situation involved, in view of the showing on the hearing that the income-tax evasions involved against Sachs and Shu-Stiles, Inc., had been commenced to be investigated in 1948. Also, clearly, the requiring of Schwimmer's files and papers relating to the affairs of Sachs, Shu-Stiles, Inc., and Mrs. Taylor, either directly or as a matter of relationship on the part of any person or corporation thereto, was of sufficient definiteness and limitation to be reasonable in its identification and scope of parties as to whom production was to be made.

This leaves for consideration only the contention that the production required by the second subpoena constituted an unreasonable search and seizure, because of the violation of attorney-client privilege which would be involved in any disclosure of the files and papers. Ancillarily, it further is argued that the appointment made of a Master and the extent of the authority delegated to him constituted in any event an improper judicial protection of the privilege involved, and that the subpoena thus, beyond the question of its general validity, had been allowed by the Court to effect an unreasonable search and seizure from violation of privilege.

The attorney-client privilege is one that exists to enable a client to have subjective freedom of mind in committing his affairs to the knowledge of an attorney, whether the matter is one of consultation or of litigation; and, in order that the client's feeling of security may be complete, the protection against disclosure is one that extends both to the communications made by him to the attorney and to

the communications made by the attorney to him related to the confidence. 7 Wigmore on Evidence, 3rd ed., §§ 2294, 2306, 2310, 2317, 2320.

The privilege thus is one that exists for the benefit of the client and not the attorney. **Chirac v. Reinecker,** 11 Wheat. (U. S.) 280, 294, 6 L. Ed. 474. But the attorney has the duty, upon any attempt to require him to testify or produce documents within the confidence, to make assertion of the privilege, not merely for the benefit of the client, but also as a matter of professional responsibility in preventing the policy of the law from being violated. "The seal of the law once fixed upon (such a privileged communication) remains forever [and for every purpose], unless removed by the party in whose favor it is there placed." 58 Am. Jur., Witnesses, § 467.

Removal of the privilege, however, requires no particular formality on the part of the client. "The client may waive the protection of the rule. The waiver may be express or implied." **Blackburn v. Crawford,** 3 Wall. (U. S.) 175, 194, 18 L. Ed. 186. Assertion of the privilege by an attorney, upon any testimony of production of documents being required of him, makes the question of waiver on the part of the client one for collateral determination by the court. As a collateral question, the court has discretion or latitude in the receiving of proof. It is not bound by the technical rules of evidence under which primary and corollary facts are required to be established. The question with which it is concerned is not whether waiver is capable of establishment by formal legal game, but whether it in fact exists, on satisfied conviction, from any credible and persuasive elements and implications shown. And such a determination of waiver as a collateral fact will, if it has a rational basis on general probative values of natural experience, be accepted as conclusive on any attempted review.

Further, in any assertion of the attorney-client privilege to avoid production of subpoenaed documents, it is to be

remembered that existence of the privilege is not a basis for keeping the documents from having to be brought before the court. The privilege is not self-operative against a judicially required production, since the court is entitled to an opportunity to make inspection of any such documents in order to satisfy itself that they are in fact privileged. **Brown v. United States,** 276 U. S. 134, 144, 48 S. Ct. 288, 72 L. Ed. 500. "* * * the individual citizen may not resolve himself into a court and himself determine (a question of privilege as to) the contents of books and papers required to be produced." **Commonwealth of Kentucky v. Southern Express Co.,** 160 Ky. 1, 3, 169 S. W. 517, 518.

What has been said as to the manner and effect of a trial court's determination of waiver of the attorney-client privilege in a particular situation is a sufficient answer to Schwimmer's attempt here to have us review the question of whether a waiver existed on the part of Shu-Stiles, Inc., and Mrs. Taylor. As to Sachs, it was directly shown from the proceedings of the grand jury, under permission of the Court, that Sachs had stated before the grand jury that he had no objection to the grand jury obtaining and examining any communications which had been involved between him and his attorney or between his attorney and other attorneys. As to Mrs. Taylor, it was shown that she had testified before the grand jury that Schwimmer never had been her attorney. As to Shu-Stiles, Inc., statement was made by Government counsel on the hearing (Schwimmer waived the taking of oath in relation to the statement) that a St. Louis attorney representing both Sachs and Shu-Stiles, Inc., in incidents connected with the grand jury's investigation, had turned over all his own files and records pertaining to the affairs of these two parties and in this position of professional responsibility had declared that both Sachs and Shu-Stiles, Inc., had waived and desired to waive any attorney-client privilege which they might at

all have. We think that all of this, in the community of relationship existing among Sachs, Shu-Stiles, Inc., and Mrs. Taylor, and in the touch which all of them manifestly had with what was going on, afforded a sufficient and rational basis for the Court to conclude, with satisfied conviction, that no present privilege could properly be claimed by Schwimmer to exist as to any of them.

As to the propriety of the Court's appointment of a Master and the power conferred upon him, the Master, as we have indicated, was put in a position to turn over to the grand jury everything in Schwimmer's files which he found to be connected with the affairs of Shu-Stiles, Inc., Sachs, and Mrs. Taylor, either directly or as a matter of relationship on the part of any person or corporation thereto, except as he concluded that there had existed a personal attorney-client relationship between any such related person or corporation and Schwimmer, distinct from that involved as to Shu-Stiles, Inc., Sachs, and Mrs. Taylor, and that some particular paper or papers came within the privilege of that separate relationship. Whether a separate attorney-client relationship existed as to any such related person or corporation, and, if so, whether any paper or papers appearing to be connected therewith were privileged, were thus left to the exclusive judgment of the Master, with no provision for any confirmation to be made by the Court, and with no opportunity to Schwimmer to check or make protest to the Court against such result as the Master might reach.

The appointment of a Master could not be claimed to have been an improper act in the situation. Beyond the provisions of Rule 53, Federal Rules of Civil Procedure, 28 U. S. C. A., for appointing and making references to Masters, a Federal District Court has "the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential." **Ex parte Peterson,** 253 U. S. 300, 312, 40 S. Ct. 543, 64 L. Ed. 919; **West-**

hester Fire Ins. Co. v. Bringle, 6 Cir., 86 F. 2d 262, 263. While reference should be the exception and not the rule n judicial administration, the Court may, in its discretion, nake appointment of a Master to assist in any of the in-idents of a proceeding before it, whether civil or criminal, so long as there is no infringement upon the right of trial by jury or any prejudice to other substantive right. But since the thing being done by a Master is a judicial incident, it necessarily is subject to such judicial standards as are applicable to any performance of it by the Court itself. And where it is of the nature or consequence of a culminating judicial result, that which the Master has done can only have legal validity through some form of subsequent confirmation or approval on the part of the Court. Cf. 45 Am. Jur., References, § 29 et seq.; Rule 53 (e), Federal Rules of Civil Procedure, 28 U. S. C. A.

Here the Master's determination of whether an attorney-client relationship existed between Schwimmer and any of those covered by the subpoena as "related" persons or corporations, and whether any of Schwimmer's papers were privileged as confidences of such a relationship, was made a matter not merely of final result but of secret result as well, in that no report, either formal or informal, was required to be made to the Court, and no one, either Schwimmer or any client, was afforded the opportunity to check, even with the Master, what determinations had been made. Had the Court itself engaged in a determination of the question of attorney-client relationship and privilege, in respect to the right to turn over files and papers to a grand jury as against a motion to quash, we do not believe that anyone would contend that such a secrecy of result on the part of the Court as to its determination would be an act of judicial stature and standard. No more could the act of the Master be one, in his substitution for the Court to resolve a judicial question, reach a judicial result, and effect a judicial disposition.

We accordingly hold that the order denying the motion to quash the second subpoena should be modified to require disclosure to be made to Schwimmer of what papers the Master found to be unprivileged and to permit Schwimmer to have a ruling from the Court on any specific papers which he contends represent confidences of a separate attorney-client relationship on the part of any related person or corporation, as covered by the subpoena. This should be capable of being informally and unburdensomely accomplished.

And its only immediate effect will be to entitle Schwimmer to the return of any such privileged papers as an unreasonable search and seizure. The modification as such can, of course, have no automatic effect upon the validity of the indictment which the grand jury has apparently returned against Schwimmer. It may turn out, contrary to Schwimmer's contention, that there has existed no separate attorney-client relationship as to any such related person or corporation; or that there are no confidential communications in the files and papers applicable to any such possible relationship; or that, if any such privileged communications have been allowed to come before the grand jury, none of them is of such a nature as to be capable of having constituted a part of the foundation for the action taken by the grand jury against Schwimmer. Also, beyond this, we do not intend anything in this opinion to be taken as an implication that, if relevant, privileged papers from Schwimmer's files have been used against him by the grand jury, his indictment is for that reason required to be vitiated.

As we have observed, the attorney-client privilege exists for the benefit of the client and not the attorney. We think, however, as our previous expression indicates, that an attorney's obligation to safeguard the privilege of his files and papers, from any attempted invasion of such protected confidences as they contain, entitles him to set up, on any

required production of the files and papers by a grand jury for use against him, the violation of privilege which would be involved in any examination of them by the grand jury, as an element of unreasonable search and seizure against him, such as was here done. Such an assertion of unreasonable search and seizure is grounded upon the attorney's ownership and possession and his right not to have those incidents disturbed by any improper search, as a means of enabling him to protect his client's privilege. It thus does not, so far as the privilege itself is concerned, go beyond the bounds of protection to the client. And, as discussed above, it does not prevent the Court itself from making inspection of the documents, to be certain that the privilege exists.

But where the Court has erroneously failed to vindicate the privilege and has allowed confidenced papers to be disclosed to the grand jury for use against the attorney (without any claim of self-incrimination having been made) any attempt by the attorney to use the violation of privilege which has occurred, as a basis for attack upon an indictment returned against him, and so as a matter of personal advantage, presents a different question. That question, however, is not now before us, and it may not even be involved in the present situation, as the proceedings required under our modification of the Court's order on the second subpoena may ultimately establish. In any event, it will be soon enough, and for the trial court, to deal with the question, when and if it is presented.

Schwimmer makes the final argument that, under the holding in **Hickman v. Taylor**, 239 U. S. 495, 67 S. Ct. 385, 91 L. Ed. 451, it was in any event improper to give the grand jury access to any of his working papers, or to what is referred to in the opinion of that case as the "work product of the lawyer". But the **Hickman** case is without any application to a grand jury investigation. It deals merely with what scope of discovery has been opened up by the

Federal Rules of Civil Procedure, and the effect of its holding is that those Rules can not be said to have been intended to compel the disclosure by a lawyer of his own "work product" in a civil action. Schwimmer's working papers would, of course, be privileged against use in any proceeding, whether criminal or civil, to the extent of any expression made by him therein of the confidences which had passed between him and his client, and as to which there had been no waiver by the client of the privilege.

On the basis of what has been said, the Court's order on the motion to quash the first subpoena is reversed, and the order as to the second subpoena is modified as herein indicated, with remand of the case for proceedings in relation to the modification.

A true copy.

Attest:

E. E. Koch,
(Seal) Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15460.
September Term, 1955.
Monday, April 23, 1956.

Harry I. Schwimmer,
Appellant,
vs.
United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of

Missouri, and was argued by appellant pro se and by counsel for appellee.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that Order of the said District Court denying motion of Harry I. Schwimmer to quash subpoena duces tecum issued October 18, 1955, be, and the same is hereby, reversed, and the Order of the said District Court denying motion of Harry I. Schwimmer to quash subpoena duces tecum issued October 20, 1955, be, and the same is hereby, modified to require disclosure to be made to said Harry I. Schwimmer of what papers the Master found to be unprivileged and to permit said Harry I. Schwimmer to have a ruling from the Court on any specific papers which he contends represent confidences of a separate attorney-client relationship on the part of any related person or corporation, as covered by the subpoena.

And it is further Ordered and Adjudged by this Court that this cause be, and the same is hereby, remanded to the said District Court for proceedings in relation to the modification and in accordance with the opinion of this Court this day filed herein.

April 23, 1956.

FILED
JUN 19 1956
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 178

HARRY I. SCHWIMMER,
Petitioner,

v.

UNITED STATES OF AMERICA, WYLLYS NEWCOMB,
HARRY RICHARDS and OMAR SCHNATMEIER.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

HARVEY B. COX,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No.....

HARRY I. SCHWIMMER,
Petitioner,

v.

UNITED STATES OF AMERICA, WYLLYS NEWCOMB,
HARRY RICHARDS and OMAR SCHNATMEIER.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause on April 23, 1956.

OPINION BELOW.

The Opinion of the Court of Appeals has not yet been reported, and is printed in the Appendix, infra, pp. 9-12.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 23, 1956. A petition for rehearing was filed by petitioner on May 11, 1956, and said petition was denied on May 21, 1956. An order staying the Court of Appeals' mandate was entered on June 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254 (1).

QUESTION PRESENTED.

1. Whether one, whose personal records are seized by Grand Jury subpoena from a third person with whom they had been stored, and who had not seen or had any real knowledge of the contents of said records for a long period of time, and who files a motion attacking said subpoena without specifically setting out the Fifth Amendment, and is later informed by Government counsel that he is the subject of the Grand Jury investigation, is precluded from asserting the privilege against self-incrimination as to said records in a suit thereafter filed seeking to enjoin the use of said records in the Grand Jury proceeding.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT.

(This cause relates generally to the same subject matter which is pending before this Court on Petition for Certiorari in the case of Harry I. Schwimmer, Petitioner, v. United States of America, which petition is being filed simultaneously herewith.)

On November 30, 1955, petitioner filed in the United States District Court for the Eastern District of Missouri a Complaint (R. 1), wherein the following allegations, insofar as they are material to this petition, were made: Petitioner is an attorney at law. For some time prior to October 21, 1955, his personal records and legal files which he had amassed during his practice of law were stored by him with the Dean Rubber Manufacturing Company in Kansas City, Missouri. A United States Grand Jury in St. Louis subpoenaed petitioner's records which were in the possession of the Dean Rubber Manufacturing Company, and all of his records which were held by the Dean Company were produced by a representative of that company before the Grand Jury (R. 2). Before the records were examined petitioner filed in the District Court motions to quash said subpoenae duces tecum on the grounds inter alia that they violated the attorney-client privilege that they were broad

and unreasonable, and that they constituted an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States. These motions were on October 31, 1955, overruled by the District Court (R. 2).

It was also alleged in said Complaint filed in the District Court that petitioner had reason to believe that his own conduct was then the subject of an inquiry before the said Grand Jury in St. Louis (R. 4), that Government counsel at the hearing on the aforementioned motions to quash had expressly told the Court that petitioner's conduct was under investigation by the Grand Jury; that to the best of his knowledge his books, records and legal files were then in the possession of some agent of the United States, and that the defendants in said cause, being the United States Attorney for the Eastern District of Missouri, the United States Marshal and the Special Assistant to the Attorney General handling the Grand Jury inquiry, intended to examine and use said petitioner's property in the investigation before the Grand Jury. Petitioner claimed that the examination and use of his books and records would constitute an unreasonable search and seizure of his property in violation of the Fourth Amendment to the Constitution of the United States and would require the petitioner to furnish evidence against himself in a criminal proceeding such as to constitute an unlawful and unwarranted seizure in violation of the Fourth and Fifth Amendments to the Constitution of the United States (R. 5-6). Said Complaint therefore prayed that an injunction be issued restraining the use of or examination of said books and records in the said Grand Jury investigation and ordering the return of said property (R. 6).

The defendants filed a motion to dismiss said Complaint on the ground that it failed to state a cause of action (R. 9), and said motion was sustained by the Court (R. 10).

On appeal of said order to the United States Court of Appeals for the Eighth Circuit, the judgment of the District Court was affirmed (see Court's Opinion, Appendix, p. 13), the Court holding inter alia that petitioner's claim of a violation of his privilege against self-incrimination could not be considered since that claim came too late and was waived since it was not expressly asserted in petitioner's original motions to quash the subpoenae duces tecum.

REASONS FOR GRANTING THE WRIT.

1. This cause involved the all-important question of whether petitioner's own books and records could properly be used against him during the course of an investigation by a Grand Jury which was then conducting an inquiry into the petitioner's own conduct and activities. There is no question but that the Complaint filed below was a proper proceeding for the purpose of seeking to enjoin the use of improperly seized evidence in a Grand Jury inquiry. This Court, in **Perlman v. United States**, 247 U. S. 7, reviewed on its merits a case in which a Complaint had been brought seeking to enjoin a United States Attorney from taking into his possession certain documentary evidence and using said evidence during the course of a Grand Jury investigation.

The Court of Appeals, however, in its Opinion affirming the dismissal of the Complaint by the District Court, held that petitioner was precluded from asserting his claim of privilege against self-incrimination through the use of his private books and papers, for the reason that he had earlier filed motions to quash the subpoenae duces tecum which had been issued for the compulsory production of these documents and had failed specifically to assert the privilege against self-incrimination therein. The allegations of petitioner's Complaint filed in the District Court and indeed the admissions of Government counsel in his argu-

ment opposing petitioner's earlier motions to quash in the District Court (R. 20 of companion case, Harry I. Schwimmer, Petitioner, v. United States of America) clearly indicate that at the time of the filing of the Complaint in the District Court an investigation was then being conducted by the Grand Jury into petitioner's own conduct, and that petitioner was himself the subject of inquiry by the Grand Jury. Under these circumstances it would appear that petitioner had a clear and substantial right to be protected with regard to his claim against self-incrimination. There was no question but that the papers involved were his own private and personal records. It is axiomatic that the constitutional guaranty forbidding the compulsory testimony of an accused applies equally to the compulsory production of his private books and papers. **Boyd v. United States**, 116 U. S. 616; **Wilson v. United States**, 221 U. S. 361; **United States v. White**, 322 U. S. 694.

In this respect it is urged that the decision of the Court of Appeals precluding consideration of the incrimination issue is contrary to the case of **Emspak v. United States**, 349 U. S. 190, wherein it was held that the waiver must be clear and unequivocal, and that every reasonable presumption must be considered against the waiver of a fundamental constitutional right. See also **Smith v. United States**, 337 U. S. 137, 150. The allegations of the Complaint filed in the District Court indicate that petitioner's records and files were not seized from his person or from his immediate possession, but rather from a third party with whom he had stored them some long time prior thereto, that said files and records were delivered by said third party to the Government counsel or to the United States Marshal (R. 2-6), and that at the time the instant Complaint was filed petitioner did not have access to the records and had not seen them for some long period of time. Indeed under the order of the District Court in the companion case, petitioner was given no right to review

the records or to examine them even after the District Court's Representative delivered certain of those records directly to the Grand Jury (see Court's Opinion in companion case, page 16) Under these circumstances the alleged failure of petitioner specifically to set out in his earlier motions to quash the subpoenae that the use of his records would furnish evidence against him in a criminal proceeding ought not be considered a waiver of his right through the Complaint filed in the District Court to raise the self-incrimination question. (It should be remembered also that in his motions to quash the subpoenae petitioner did set out that the compulsory production of his books and records would constitute an unreasonable search and seizure under the Fourth Amendment to the United States Constitution, which Amendment has been held to prohibit the compulsory production of one's private papers for the purpose of establishing a criminal charge against him. **Boyd v. United States**, supra.) Furthermore, not until after petitioner's motions were filed did Government counsel specifically inform petitioner that he was himself under investigation.

Thus at the time of the original motions to quash the subpoenae petitioner did not have his legal files and records before him and had not indeed seen them for a long period of time. Therefore, he could not intelligently and knowingly have waived any constitutional privilege relative to self-incrimination since he had no real knowledge of their contents. In this respect the Court of Appeals' decision is further in conflict with the cases of **McKinney v. United States**, D. C. Cir., 208 F. (2d) 844, and **Waters v. Central Trust Co.**, 2 Cir., 126 F. 469, to the effect that such a waiver of a constitutional privilege cannot lightly be inferred and can be found only if there is an **intentional** abandonment or relinquishment of a **known** right. This question of whether one can intentionally waive the privilege against self-incrimination

when he does not at the time have any real knowledge of the contents of the records involved is one of extreme importance, and the Court of Appeals' narrow and limiting interpretation of the contitutional guaranty should therefore be reviewed by this Court.

CONCLUSION.

For these reasons, it is therefore respectfully submitted that this Petition for a Writ of Certiorari should be granted.

HARVEY B. COX,
MORRIS A. SHENKER,
BERNARD J. MELLMAN,
Counsel for Petitioner.

OPINION OF COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,494.

Harry I. Schwimmer,
Appellant,
vs.
United States of America, Wyllys Newcomb, Harry Richards, and Omar Schnatmeier,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[April 23, 1956.]

Harry I. Schwimmer, pro se (Harvey B. Cox, Morris A. Shenker and Bernard J. Mellman were on the brief), for Appellant.

St. John Barrett, Special Attorney, U. S. Department of Justice (Harry Richards, United States Attorney, Murry L. Randall, Assistant United States Attorney, and Albert M. Christopher, Attorney, Department of Justice, with him on the brief), for Appellees.

Before Gardner, Chief Judge, Johnsen and Vogel, Circuit Judges.

Johnsen, Circuit Judge.

This is a companion case to No. 15,460, Schwimmer v. United States, decided concurrently herewith. In that case

we reversed the trial court's denial of a motion to quash one subpoena duces tecum issued in a grand jury investigation, and affirmed, with modification, the denial made as to another.

Thirty days after the trial court's ruling on the motions to quash, and fifteen days after our action upon the application made for a stay of the trial court's order pending appeal, Schwimmer instituted this suit in injunction, to prevent any of the files and papers required to be produced under the two subpoenas from being turned over to the grand jury. He further sought to prevent some other files and papers, belonging to a third party and produced by the latter for use by the grand jury, from being so turned over.

The injunction was sought against the attorneys for the Government handling the grand jury investigation and against the United States Marshal.

The trial court sustained a motion to dismiss the suit, and Schwimmer has appealed.

Our decision in the companion case has determined the questions involved as to Schwimmer's own files and papers, except that he has attempted in this suit to claim additionally that the production required by the subpoenas would violate his privilege against self-incrimination under the Fifth Amendment. That claim, if it had any basis and he was not intending to waive it, ought, we think, to have been asserted by him in his motions to quash the subpoenas, when he consideredly chose to make that form of attack his basis for obtaining judicial intervention and determination of his rights to have the files and papers kept from coming into the grand jury's possession. Schwimmer was an attorney and so manifestly did not lack knowledge of what his rights were or how they could be vindicated. Without any attempted explanation in his complaint of

hy the claim of self-incrimination was not asserted in his notions to quash, it would appear that he was engaging in series of ballistic steps, to halt, for as long a time as possible, the turning over to the grand jury of any part of his les and papers. The court was not required to allow itself r the grand jury to be thus toyed with in the conducting f an investigation. (What we have said is, however, without any implication on the question of self-incrimination n relation to any trial proceedings under the indictment vhich has now been returned against Schwimmer.)

But apart from what has been said above, there is another reason why the court's dismissal of the injunction suit must be affirmed. At the time the request came before the court, there was no basis for it to issue an injunction, to prevent the grand jury from getting possession of such part of Schwimmer's files and papers as it was open to the Master to turn over to it, since this had already occurred. Whether the fact was then known to Schwimmer or not, the grand jury had on the previous day returned an indictment against him, and thus an injunction to prevent delivery and use of the files and papers could not have been to any avail.[1]

As to the files and papers of the third party which Schwimmer similarly sought to have kept from the grand jury, the situation is the same. This leaves whatever attorney-client privilege there may have existed in Schwimmer's favor as to these files and papers (Schwimmer claimed that the third party was a lawyer and that he was the third party's client) a matter for assertion by him in relation to any attempted use of such files and papers on a trial under the returned indictment. It may be added that Schwimmer's further claim that any use of such third

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[1] We need not here consider to what extent, if any, injunction is available to prevent a grand jury's consideration of subpoenaed documents.

party's papers would involve also a violation of the Fifth Amendment against him is untenable, because admittedly he had neither ownership nor possession of the papers, and their production thus could hardly involve any incrimination of himself at his own hands. A client's right of privilege as to files and papers which are the property and in the possession of his attorney is independent of his rights under the Fifth Amendment. It rests on its own policy of sanctity as to confidences, regardless of whether any disclosure would or would not be capable of legal effect against him. Breach of the privilege by an attorney through disclosure, or by a court in erroneously failing to vindicate it, is therefore not as such a violation of the Fifth Amendment, in its guaranty against self-incrimination.

Affirmed.

A true copy.

Attest:

E. E. Koch,
Clerk, U. S. Court of Appeals, Eighth Circuit.

(Seal)

(Judgment.)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15494.

September Term, 1955.

Monday, April 23, 1956.

Harry I. Schwimmer,
Appellant,

vs.

United States of America, Wyllys Newcomb, Harry Richards and Omar Schnatmeier.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by appellants pro se and by counsel for appellee.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

April 23, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 177

HARRY I. SCHWIMMER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 178

HARRY I. SCHWIMMER, PETITIONER

v.

UNITED STATES OF AMERICA, WYLLYS NEWCOMB, HARRY RICHARDS AND OMAR SCHNATMEIER

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (Pet. I, 9–26; Pet. II, 9–12) have not yet been reported.[1]

[1] The two proceedings in which petitioner seeks review are so interrelated that we treat them together in this brief in opposition. The petition and record in No. 177, are designated Pet. I and R. I respectively. The petition and record in No. 178 are designated Pet. II and R. II respectively.

JURISDICTION

The judgments of the Court of Appeals were entered on April 23, 1956 (Pet. I, 26-27; Pet. II, 13). Petitions for rehearing were denied on May 21, 1956. The petitions for writs of certiorari were filed on June 19, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In No. 178:

1. Whether the District Court properly dismissed a complaint for an injunction to prevent the grand jury from considering certain records, where an indictment had been returned before the application was heard and the issues as to the admissibility of the records were therefore left for determination at the trial.

In No. 177:

2. Whether the denial of a motion to quash a subpoena and for the return of records produced by a third-party agent of the movant should be reviewed where an indictment was subsequently returned against the movant but trial was suspended as to the movant because of his illness.

3. Whether an attorney who moves to quash a subpoena directed to a third-party with whom his records have been stored must claim the privilege against self-incrimination if he wishes to rely thereon.

4. Whether there was sufficient proof before the District Court that the clients had waived the attorney-client privilege.

STATEMENT

Petitioner, an attorney who formerly practiced law in Missouri, changed his residence and stored his file cabinets and boxes of records on the premises of the Dean Rubber Manufacturing Company of Kansas City, Missouri (R. I, 9). A grand jury of the Eastern District of Missouri, which was investigating the possible existence of a conspiracy to defraud the United States of the proper services of its employees in certain tax cases (R. I, 20), served upon the Dean Company on October 18, 1955, a subpoena calling for all of petitioner's records (R. I, 1); and on October 21, 1955, another subpoena calling for production of such of the records as related to the representation by petitioner of Irving Sachs, Shu-Stiles, Inc., and Mrs. Laura Taylor for the period from September 1, 1945, to the date of the subpoena, together with records for the same period reflecting the receipts and disbursements by petitioner (R. I, 2–3).

On October 25, 1955, petitioner filed separate motions in the District Court to quash the subpoenas and for return of the property (R. I, 4–8), the Dean Company having on October 25 delivered to the United States Marshal all of petitioner's records in its possession (R. I 11).[2] The grounds of the motion were that the subpoenas were so broad in scope as to constitute an unreasonable search and seizure, and that examination of the documents would violate the attorney-client privilege (R. I, 4–8). No issue

[2] The records were held by the Marshal and not examined pending a ruling by the District Court (R. I, 11).

was raised as to the privilege against self-incrimination.

At the hearing on the motions, counsel for the government stated that the "Grand Jury is investigating among other things Mr. Schwimmer's role and conduct in the so-called Sachs case" (R. I, 20). With permission of the court, he read a portion of the transcript of the testimony of Mr. Sachs before the grand jury in which Mr. Sachs stated that he waived the attorney-client privilege (R. I, 21–22). Government counsel also stated that he had communicated with an attorney in St. Louis who stated that he was the attorney for Mr. Sachs, and that both Mr. Sachs and Shu-Stiles waived their privilege (R. I, 23). Government counsel stated that the attorney in question had already turned over to the grand jury his own files and that a Kansas City attorney had done the same (R. I, 23, 25). Government counsel offered to put his statements in affidavit form, but petitioner's counsel said that was unnecessary, although he did object that the testimony as to what other counsel had said was hearsay (R. I, 23–25). As to Mrs. Taylor, government counsel stated that she had told him and had testified before the grand jury that petitioner was never her attorney (R. I, 29).

The District Court denied, as to both subpoenas, the motions to quash and for the return of the property (R. I, 34–35). In its order it provided for the appointment of a special master to examine the documents in order to determine which of those relating to clients other than Sachs, Shu-Stiles, Inc., and Mrs.

Laura Taylor (all of whom were found to have waived their attorney-client privilege) were subject to the attorney-client privilege. The documents found to be so privileged were to be impounded until further order of the court; the unprivileged ones were to be turned over to the grand jury.

After denial of his motions, petitioner applied to the Court of Appeals for a stay pending appeal which would restrain the United States from using the records in any way before the grand jury. The Court of Appeals granted a stay as to the first, the general, subpoena, but denied a stay as to the second (see Pet. I, 12).

On November 30, 1955, after denial in part of his motion for a stay, petitioner filed in the District Court a complaint seeking an injunction restraining the attorneys for the government from using before the grand jury any records produced by the Dean Rubber Company (R. II, 1–9).[3] In his complaint, in addition to the grounds previously set forth, he alleged that use of the documents would violate his privilege against self-incrimination (R. II, 5). He also sought to enjoin use of other documents produced before the grand jury by a third party, an attorney, claiming that he, petitioner, was the client of the third party (R. II, 7–9). The District Court dismissed the complaint on December 2, 1955 (R. II, 10). The day before, on December 1, 1955, the grand

[3] Only those relating to the Sachs, Shu-Stiles, Taylor matter were subject to examination under the order of the Court of Appeals.

jury had returned an indictment charging petitioner and two others with conspiracy to defraud the United States in relation to the Sachs and Shu-Stiles, Inc. prosecution for income tax evasion.

With respect to the appeal of the denial of the motions to quash (No. 177), the Court of Appeals held that petitioner had standing to object, since the documents were his and were merely stored with the Dean Company (Pet. I, 14). It held that the first general subpoena was too broad and should have been quashed (Pet. I, 14–17). Since the Dean Company had, however, before the motion was heard, produced all the records stored with it without attempting to separate those specifically relating to the second subpoena, the court noted that its reversal as to the general subpoena would prevent "any examination being made by the grand jury of such files and records as are beyond the scope of the second subpoena" (Pet. I, 17).

As to the second subpoena, the Court of Appeals held that it was properly limited as to subject matter and time, so as not to constitute an unreasonable search and seizure (Pet. I, 18–19). It ruled that there was sufficient evidence to support the conclusion of the District Court that Shu-Stiles, Inc., Irving Sachs, and Mrs. Taylor had waived the attorney-client privilege (Pet. I, 20–22). The Court of Appeals also held that it was proper for the District Court to have appointed a master to determine preliminarily whether anything in the papers found to be connected with the Shu-Stiles matter (which under the second

subpoena could be turned over to the grand jury) was subject to an attorney-client privilege of some person other than those who were found to have waived the privilege, but that petitioner was entitled to be told what papers had been found to be not privileged and to have a ruling from the court if he claimed that some other client was involved (Pet. I, 22–24).

As to the civil action for injunction (No. 178), the Court of Appeals held that the complaint had properly been dismissed. Its decision on the motions to quash the subpoenas, it noted, governed on the points there raised (Pet. II, 10). On the claim of privilege against self-incrimination, raised for the first time in the injunction complaint, the court ruled that the assertion of the claim came too late in relation to use of the documents before the grand jury where petitioner chose not to assert it in his motions to quash, particularly since the papers had already been before the grand jury prior to the time the civil action came before the court (Pet. II, 10–11). The fact that the grand jury already had seen the documents and had already returned an indictment was, the Court of Appeals found, itself a sufficient basis for denial of the injunction (Pet. II, 11). The court specifically noted, however, that its decision was "without any implication on the question of self-incrimination in relation to any trial proceedings under the indictment which has now been returned against Schwimmer" (Pet. II, 11). Similarly, it held that any assertion of the attorney-client priv-

ilege by petitioner as to papers produced by the third-party attorney was "a matter for assertion by him in relation to any attempted use of such files and papers on a trial under the returned indictment" (Pet. II, 11).

After the decision of the Court of Appeals, the government filed in the District Court a motion to permit it to make available for petitioner's inspection the books, records and documents delivered by the master to the grand jury. In connection with the motion, the government listed the papers (about 228 in number) which the master had found to be not subject to the privilege and stated that three of them had been introduced as exhibits before the grand jury. On April 30, 1956, the District Court granted authorization to make such documents available to petitioner for inspection.

On May 7, 1956, the trial of petitioner and his two co-defendants commenced in the District Court, a stay pending determination of the petitions for certiorari in the instant proceedings having been denied by the District Court, the Court of Appeals, and the Chief Justice of the United States. Petitioner had a heart attack, and the trial was severed as to him on May 28, 1956. Records which had been taken from the subpoenaed files were not finally introduced in evidence until petitioner's case had been severed.

ARGUMENT

1. As to No. 178, the civil injunction action brought against government counsel individually, the cause in its present posture presents no issue which is ripe

for review. As the Court of Appeals pointed out in its opinion, the indictment against the petitioner had been returned the day before the motion to dismiss the complaint came before the District Court. The grand jury had already considered the evidence which was the subject matter of the suit. Insofar as the action sought to enjoin government counsel from turning evidence over to the grand jury, it requested relief which the court was powerless to grant. An action for injunction becomes moot where the act sought to be enjoined has already occurred. *Chandler* v. *Wise*, 307 U.S. 474, 477–478; *Brownlow* v. *Schwartz*, 261 U.S. 216, 217–218; *Jones* v. *Montague*, 194 U.S. 147. Since mootness had occurred before the application was heard, the District Court properly dismissed the complaint.[4]

Thus, there is no occasion at this time to reach the question which petitioner attempts to pose in this proceeding, *i. e.*, whether after having (as we show *infra*) deliberately failed to raise the issue of the privilege of self-incrimination when the documents were first subpoenaed, he may subsequently assert the privilege in relation to such documents. The matter of the privilege was not raised before the documents had been considered by the grand jury. Whether it can be raised later is an issue to be determined when and if petitioner is tried under the indictment.

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[4] In *Perlman* v. *United States*, 247 U. S. 7, relied upon by petitioner, the action was brought before consideration of the documents by the grand jury.

2. As to No. 177, the proceeding to quash the subpoena, while it may not be technically moot,[5] the issues raised are, as to petitioner, in large measure academic since they will assume significance only if he becomes well enough to stand trial. If that should happen, a ruling on the admissibility of the evidence can be obtained at the trial and reviewed on appeal if petitioner is convicted. There is no reason for this Court to review the matter at this intermediate stage.

3. In any event, the challenge to the validity of the subpoena is without merit. Petitioner does not here challenge the ruling of the Court of Appeals that the narrow subpoena, which was limited and definite as to subject matter and time, was a reasonable one, and that ruling was clearly correct. See *Brown* v. *United States*, 276 U. S. 134; *Wheeler* v. *United States*, 226 U. S. 478; *Consolidated Rendering Company* v. *Vermont*, 207 U. S. 542; *Shotkin* v. *Nelson*, 146 F. 2d 402 (C. A. 10); *Consolidated Mines* v. *Securities and Exchange Commission*, 97 F. 2d 704 (C. A. 9).

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[5] Ordinarily, a motion to quash a grand jury subpoena is not an appealable order. *Cobbledick* v. *United States*, 309 U. S. 323. This case, however, was in a somewhat different posture since the subpoena was directed to the custodian of the property who produced the documents before the court, and petitioner sought to have the property returned to him as his. Under these circumstances, the motion could properly be treated as one for the return of property before indictment, a separate action which does lie. *Perlman* v. *United States*, 247 U. S. 7.

By the time the cause was before the Court of Appeals on appeal, an indictment had been returned against petitioner. The Courts of Appeals are divided as to whether a motion to suppress and for the return of property made before indictment, but decided or appealed after indictment has been returned, merges into the

Petitioner's argument is that, since the subpoena called for the production of his private records, it was *ipso facto* invalid, whether or not he chose to claim the privilege of self-incrimination with respect thereto. The privilege, however, is a personal right which may be waived and is waived by failure to assert it at the first opportunity. *Rogers* v. *United States*, 340 U. S. 367, 370–371; *United States* v. *Monia*, 317 U. S. 424, 427; *United States* v. *Murdock*, 284 U. S. 141, 148; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 112–113. A person who testifies without claiming the privilege is in no position to assert that his testimony was compelled. So one who allows records to go before the grand jury without raising the privilege cannot assert that the production of the records was compelled.

In this case, petitioner could have claimed the privilege with respect to the records in his motion to quash. Although the subpoena was directed to a third party, petitioner's motion was made before the records had been turned over to the ground jury, and his standing to contest the subpoena has been upheld. Had he raised the issue of privilege and had his claim

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criminal case so as to be reviewable only after conviction. Cf. *Lapides* v. *United States*, 215 F. 2d 253 (C. A. 2); *In re Sana Laboratories*, 115 F. 2d 717 (C. A. 3), certiorari denied, 312 U. S. 688; *Dowling* v. *Collins*, 10 F. 2d 62 (C. A. 6), certiorari denied, 270 U. S. 660 (holding that it remains an independent proceeding) with *United States* v. *Mattingly*, 285 Fed. 922 (C. A. D. C.), reaffirmed in *Nelson* v. *United States*, 208 F. 2d 505, 516–517 (C. A. D. C.), and *United States* v. *Williams*, 227 F. 2d 149 (C. A. 4) (holding that it merges in the criminal action). In the Court of Appeals, the Government did not contest appealability.

been overruled, he would have been in a position to argue compulsion. But there is no compulsion involved in petitioner's own deliberate act of refraining from asserting the privilege. The case is thus materially different from *Boyd* v. *United States,* 116 U. S. 616, where the compulsion lay in the fact that failure to produce documents was, under the particular statute there involved, a confession of their character as described in the complaint.

The argument, made by petitioner in No. 178 (Pet. II, 5–7), but pertinent to No. 177 as well, that the waiver of the privilege was not knowingly and consciously made because he had forgotten the contents of the records is a curious one. By the same token, oral testimony voluntarily given becomes involuntary if it turns out to be more damaging than the testifier had thought it to be. Petitioner is an attorney, who obviously knew of his right to claim the privilege. He does not claim that, before the motion to quash, he was unaware of the possibility that his conduct in the Sachs matter was the subject of investigation; in the petition for certiorari in No. 178, it is stated (Pet. II, 7) that "not until after petitioner's motions were filed did Government counsel *specifically* inform petitioner that he was himself under investigation" (emphasis added).[6] Yet, not only did he fail to assert the privilege in the motion to quash, but, on the hearing of that motion, after government counsel had

[6] At the trial under the indictment, there was testimony by a representative of the Dean Company that petitioner had examined the stored records after the subpoena had been served but before the return date.

expressly stated that petitioner's conduct was under investigation, no claim of privilege was tendered. Indeed, the government's brief in the Court of Appeals states that, at the argument in the Court of Appeals on application for a stay after the motion to quash the subpoena had been denied by the District Court, petitioner's counsel specifically disclaimed reliance on the privilege.

In short, when the subpoena was first served, petitioner chose for his own reasons not to rely on the privilege. Subsequently, after the indictment was returned, he changed his mind. Whatever may be the effect of that subsequent change of heart, it furnishes no basis for quashing a proper subpoena seeking records as to which the privilege was not claimed.

4. The factual issue as to whether the District Court had before it sufficient evidence to show that Sachs, Shu-Stiles, Inc., and Laura Taylor had waived the attorney-client privilege presents no question for review here. It is evident that petitioner is seeking to take advantage of a privilege which is not his. None of the clients involved has before or since claimed a breach of privilege.

As to Sachs, the record is clear that he specifically waived the privilege before the grand jury. With respect to Shu-Stiles, Inc., while the relationship between Sachs and the corporation was not developed at the hearing, it seems evident that Sachs could speak for the corporation as well. In addition, there was the statement of government counsel, not merely as to what the attorney for the corporation had told him

about the waiver of privilege, but to the actual fact that the records of two attorneys for Shu-Stiles had been turned over to the government. As to Mrs. Taylor, although her statement before the grand jury was not read, there was the declaration of government counsel (petitioner's counsel having previously said that he did not doubt the word of government counsel) that she had testified that petitioner was not her attorney (see the Statement, *supra,* p. 4).

This Court held in *Blackburn* v. *Crawfords,* 3 Wall. 175, 194, that "The client may waive the protection of the rule. The waiver may be express or implied." The District Court had before it ample evidence justifying the conclusion that petitioner had no privilege with relation to the clients here involved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

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Petitioner,

v.

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UNITED STATES OF AMERICA, WYLLYS NEWCOMB, HARRY RICHARDS, and OMAR SCHNATMEIER.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

ARGUMENT.

1. Respondents in their brief repeatedly take the position that petitioner in his original motions to quash the subpoenae raised no issue as to the privilege against self-incrimination, and that he is thereby precluded from attacking the denial of his motions to quash on that basis.

Respondents do not dispute, however, and apparently make no attempt to answer the fact that in his motions to quash the subpoenae duces tecum the petitioner specifically asserted all of the rights and privileges to which he was entitled under the Fourth Amendment to the Constitution of the United States (R. I, 4-7). Petitioner, by asserting his privileges under the Fourth Amendment, was specifically objecting to the involuntary seizure and compulsory use of his own private books and records in a criminal proceeding, to-wit, the Grand Jury investigation into his affairs. Even the so-called narrow subpoena, which is the one sustained by the Court of Appeals, commanded the production of all of petitioner's personal records in his practice of law for over a ten-year period (R. I, 2-3).

The Government's position apparently is that it may compel the production in a criminal investigation of the private books and records of the person against whom the investigation is directed and for use in such investigation, notwithstanding the constitutional guaranties of the Fourth Amendment were asserted at the first opportunity. Such a position would, it seems, be directly contrary to the language of this Court in the case of **Boyd v. United States**, 116 U. S. 616, 622, wherein it was held:

> "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure."

That decision held also that constitutional provisions for the security of person and property should be liberally construed, for otherwise illegitimate and unconstitutional

practices obtain a firm foothold, which cannot easily be eradicated (116 U. S., at 635).

If, as indicated in the Boyd case, the seizure of a man's private books and papers to be used in a criminal proceeding against him is not substantially different from compelling him to be a witness against himself, and if the compulsory production of his books and records compels him to be a witness against himself within the meaning of the Fifth Amendment and is the equivalent of an unreasonable search and seizure within the meaning of the Fourth Amendment, surely it is not a liberal or fair construction of the constitutional privilege to contend that petitioner could not attack the original subpoenae on the basis of self-incrimination, because the words "Fifth Amendment" or the words "self-incrimination" did not formally appear in his motions.

With regard to the narrower subpoena it is not correct, as respondents contend, that petitioner does not challenge the ruling of the Court of Appeals that the subpoena was properly limited as to subject matter. For the very basis of petitioner's contention is that the subject matter of the subpoena, namely, his own records were not such as could be properly subpoenaed in such a proceeding.

The cases cited by respondents in support of its proposition that one who testified without claiming the self-incrimination privilege cannot assert that his testimony was compelled, are not applicable or controlling here. Thus in the case of **Rogers v. United States**, 340 U. S. 367, the situation was one where a party appearing before a Grand Jury had freely answered incriminating questions relative to her connection with the Communist party. Having done so, the Court held that she was required to give details as to her answers and could not later claim the privilege against self-incrimination as to such details. Certainly such a situation is a far cry from the instant one, where

at the first opportunity petitioner attacked the subpoenae and sought to quash the same on the basis of stated constitutional guaranties.

Similarly, in the case of **United States v. Monia**, 317 U. S. 424, the Court was concerned there with whether one summoned to testify before a Grand Jury inquiring into an alleged violation of the Sherman Act obtains immunity from prosecution for such an offense though he does not claim his privilege against self-incrimination. The Court held that although one must ordinarily claim the privilege in order to be afforded its protection, nevertheless the plain language of the Sherman Act granted immunity notwithstanding the failure to claim the privilege against self-incrimination. In the case of **United States v. Murdock**, 284 U. S. 141, one subpoenaed to give information to Internal Revenue agents relative to his federal income tax return refused to answer the questions put to him on the ground that he might thereby incriminate himself under state law. The defendant there specifically stated that he was not urging self-incrimination under federal law. Under such circumstances the witness was logically held affirmatively to have waived the privilege against self-incrimination under the United States Constitution, and thereby he could not later assert it in attacking an indictment based on his refusal to supply such information.

And finally, in the case of **United States ex rel. Vajtauer v. Commissioner of Immigration**, 273 U. S. 103, one against whom deportation proceedings were instituted merely stated, when called upon to testify, that he would not answer any questions until the evidence upon which the warrant was based would be presented. He continued to stand mute after all of the Government's case was presented. After his order of deportation, he filed a writ of habeas corpus in which he alleged that answers to questions put to him at the hearing would have tended to incriminate him under Illinois State law. This Court, in

affirming the dismissal of the habeas corpus petition, held that aside from the questionable nature of the claim of self-incrimination under State law, his failure to assert any privilege at the time of the refusal to answer the questions barred his claiming the privilege of self-incrimination at a later time.

Petitioner believes that the case at bar presents a far different situation for the reason that the unlawfulness of the seizure of his records and private papers was specifically raised by petitioner on the basis of the violation of his constitutional privileges under the Fourth Amendment, and this contention was asserted at the very inception of the proceedings below. Since this Court has held that unreasonable searches and seiures are almost always made in order to compel an individual to give evidence against himself and that compelling one to be a witness against himself is equivalent to an unreasonable search and seizure, petitioner reasserts that the question of the self-incriminatory nature of the subpoenae in question are before this Court for review.

2. Respondents state in their brief (p. 10) that the issues raised by petitioner are largely academic and will assume significance only if petitioner becomes well enough to stand trial. It is further stated in said brief (p. 9) that since the Grand Jury had already considered the evidence which was the subject matter of the injunction suit (No. 178), that issue is also moot. These contentions, it seems to petitioner, are completely without merit, and should not prevent this Court from reviewing the important questions of law here involved. The forced performance of acts does not render a case moot when the consequences of the performance may be set aside if the injunction is granted at some future time. **Porter v. Lee**, 328 U. S. 246, 251; **Mills v. Green**, 159 U. S. 651, 654. In the case now before the Court the question of whether the Grand Jury properly

received the items of petitioner's personal books and records, which records were used against him in the procurement of the indictment, may well have some bearing on the validity of the subsequently returned indictment. Furthermore, petitioner is entitled not to be put to the expense of the preparation for and participation in a trial based on an indictment, if the means used in procuring the indictment be subject to the criticism of which plaintiff here complains. These matters are therefore neither academic nor moot, but are of great and general importance and should be considered by this Court.

CONCLUSION.

For the reasons set out above, and those set out in the original petitions, the writs of certiorari should be granted.

Respectfully submitted,

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